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ABSTRACT

To test the findings of a 1981 study, which concluded that the Supreme Court of Chief Justice Warren Burger has attempted to reverse the liberal policies of the court presided over by Earl Warren by adopting a policy of ignoring precedent, a second study duplicated the earlier study's general research design, except that it focused on freedom of expression cases rather than on economic and civil liberties cases. Findings of the second study contradicted the findings of the earlier study in each of five major areas. The latter study found (1) no difference between the two courts in the ways they cited the Warren Court in freedom of expression cases; (2) no difference in the way the two courts cited the Warren Court when favorableness of freedom of expression was controlled for; (3) the Burger Court cited the Warren Court in raw numbers in free expression cases almost three times as much as the Warren Court cited itself; (4) the Burger Court cited the Warren Court about twice as often as the Warren Court cited itself in substantive citations to freedom of expression cases; and (5) the Burger court cited the Warren Court about three and a half times more often than the Warren Court cited itself when the outcomes were favorable to freedom of expression and about the same when the outcome was unfavorable. Differences in the results of the two studies may be attributable to improvement in methodology, the nature of freedom of expression cases, or the attitudes of the two courts. (JL)

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EFFECT OF PERSONNEL CHANGE ON SUPREME COURT USE OF PRECEDENT IN FREEDOM OF EXPRESSION CASES

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ABSTRACT

EFFECT OF PERSONNEL CHANGE ON SUPREME COURT USE OF PRECEDENT IN FREEDOM OF EXPRESSION CASES

Many students of the Supreme Court of the United States have speculated about or researched the question of whether the Burger Court has measurably departed from the Warren Court's interpretation of law, and if so, to what degree. One approach, reported in 1981, sought to find differences between the Warren Court and Burger Court by comparing the use of Warren Court precedent by the Warren Court with the use of Warren Court precedent by the Burger Court. The study generally concluded that the Burger Court has decided to ignore the Warren Court.

The authors for this study criticized and replicated the study by applying the methodology to the area of freedom of expression. The authors generally found that the Burger Court has used Warren Court precedent in freedom of expression areas quantitaively and qualitatively no differently than or, in some situations, more frequently than the Warren Court used its own precedent.

The authors suggest that the differences in the findings might be attributed to the improvement in the methodology or to the nature of freedom of expression cases. The authors also suggest that the attitudes of the respective courts toward the institutional role of the court might explain the curious difference in their use of Warren Court precedent.

EFFECT OF PERSONNEL CHANGE ON SUPREME COURT USE OF PRECEDENT IN FREEDOM OF EXPRESSION CASES

The Supreme Court of the United States under the leadership of Earl Warren will long be remembered as a "liberal court" due to the dozens of landmark civil liberties decisions it handed down. Among these were decisions involving school desegregation, race relations, law enforcement procedures, religious practices, and voting. Almost all brought about guarantees of liberties for individuals and were unprecedented in Supreme Court history. Because the Warren Court's vigorous defense of civil freedoms often outpaced the other two branches of government, justices often found themselves in the middle of controversy and public attention.[1]

Soon after Richard Nixon's election to the presidency in 1968, he found himself in the enviable position of replacing four members of the Supreme Court; Justice Fortas resigned and Chief Justice Warren and Justices Harlan and Black retired. During his campaign Nixon had severely criticized the Court for its liberal policies, and he promised to appoint "strict constructionists" to reverse or undermine the effects of Warren Court precedent. Through the appointments of William Rehnquist, Lewis Powell, Harry Blackmun, and Warren Burger, Nixon exercised the well-known political practice of attempting to change Supreme Court policies by changing its personnel. For this he has been harshly criticized, although certainly he was not the first American president to aim for a new ideological majority on the Court. To the extent that

he was successful, the year 1969 is considered by many observers to mark the end of a unique era in the history of the United States, as well as the beginning of a period expected to be quite different.[2]

Some critics, like Funston,[3] claim that a president's ability to influence the political direction of the Supreme Court is limited. Charging that the differences between the Burger and Warren courts are far outweighed by the similarities, he wrote that continuity is one of the outstanding characteristics of the Court in a mixed system of government, and no one appointment is ever as consequential as the press would lead citizens to believe. Furthermore, even a "new" Court "carries with it the intellectual baggage of its predecessors."[4] The Nixon appointees, as judicial conservatives, have been placed in the position of having to adhere to the rule of stare decisis which means, in this case, 15 years of Warren Court precedent. Funston asserted that, for the most part, the Burger Court has done this and consequently the Warren-to-Burger transition has been far less dramatic than expected.

Critics of the Burger Court, however, charge that the new majority is "about a wholesale reversal" of Warren Court precedent and policy. Wasby, for instance, takes the position that policy changes from the Warren Court to the Burger Court have been substantial, stemming from the Burger Court's hesitation to expand Warren Court doctrine and even some retrogression from the preceding

Court.[5] And Neuborne, taking perhaps the most critical position, makes the case that the Burger Court has undermined the Warren Court, not by overruling or limiting its decisions but by indirectly dismantling their effectiveness:

> Unfortunately, much of the procedural retrenching of today's Court appears to be a kind of intellectual guerilla warfare aimed at many of the more controversial substantive decisions of the Warren era. Rather than forthrightly confronting these decisions and seeking to reverse them openly, some members of the Court have apparently chosen to cripple them covertly by dismantling the apparatus needed for their enforcement.[6]

At least three strategies proposed in discussions of the transition are worth noting here. The first, best described by Neuborne, is that the Burger Court has placed procedural limits on federal litigation and thus has indirectly removed the effects of precedents.[7] A second strategy, posited by Slotnick,[8] is that Chief Justice Burger has altered opinion assignment patterns. Slotnick maintained that in assigning opinions, Burger has rewarded most often his own clique and the White-Stewart swing pair, as well as frequently relying on Justice Rehnquist as a conservative spokesman for the Court.

A third strategy, proposed by Johnson, is that the Burger Court has simply ignored Warren Court precedent.[9] In his 1981 study, Johnson concluded that the Burger Court attempted to reverse the liberal policies of the Warren Court, even before Powell and Rehnquist were appointed, by adopting a policy of ignoring precedent. The data in his study suggest that, early in the Burger Court era, Warren Court precedents seldom guided decision-making

of the Burger Court. Johnson's study is the focus of this paper.

The Johnson Study

Johnson's findings were based on an analysis of Burger Court reactions to and treatments of previous Warren Court decisions, in comparison with the treatments of the same decisions a few years earlier by the Warren Court. A list of 347 nonunanimous and non-per curiam decisions from 1961, 1962, and 1963 terms was drawn from data collected by Glendon Schubert.[10] Johnson then gathered citation data on these terms from volumes of Shepard's United States Citations which covered the Warren Court terms 1962-66 and the Burger Court terms 1970-71.

Citations to the three Warren Court terms were then classified as either positive or negative treatments of precedent. Johnson defined positive cases as those in which the majority opinion indicates that the Court is following a previous Court decision or is attempting to justify the current decision in terms of precedent. He operationalized this concept to include any citation coded by Shepard's classification system as "following," "harmonized," or "parallel." Negative treatments, on the other hand, were described by Johnson as those cases in which the Court majority limited the impact of a previous decision by distinguishing it from the case at hand, by giving it a limited interpretation, or by overturning it. He labeled as negative all citations coded by Shepard's as "distinguished," "limited," or "overturned."[11]

Focus on Freedom of Expression

Johnson's general research design will be duplicated in this study, but rather than the economic and civil liberties cases we will study freedom of expression cases. This departure seems important to understand better the controversy over whether the Burger Court has indeed poorly served the constitutional system of freedom of expression.

First Amendment scholar Thomas Emerson perhaps does the best job of analyzing these criticisms.[12] He argued that the Burger Court has failed to deliver the values implicit in the concept of free speech and press by (1) holding a predilliction for ad hoc balancing, (2) failing to take proper account of the evil dynamics of suppression, and (3) being unwilling to develop innovative doctrines to respond to society's changing needs. Emerson wrote, "While the Burger Court has fully accepted the traditional set of values underlying the first amendment, it does not often articulate those values, and does not always take them to their logical conclusion."[13]

The "preferred position" doctrine, which holds that freedome of expression has a special place in the constitutional system, has never been wholeheartedly accepted by the Burger Court and, Emerson claimed, it has frequently been ignored. He cited Houchins v. KQED, Inc.,[14] Gannett Co. v. DePasquale,[15] and Mount Healthy School District v. Doyle,[16] as three cases in which the Burger Court "scarcely displayed a serious effort to give freedom of expression a preferred position."[17] Emerson added:

> All of these cases, and others, suggest that where the Burger Court does not favor the type of expression involved, where it feels inclined to defer to legislative judgment, or where it prefers another social interest, it does not feel bound by the preferred position doctrine. Its failure to start its analysis in freedom of expression cases from this doctrinal base is likely to lead the Court to conclusions that give little effect to first amendment values.[18]

Furthermore, Emerson has charged, the Burger Court's use of the clear and present danger test is erratic and confusing, employed only in limited circumstances. The Court's primary test to determine the scope of First Amendment protection is balancing; and, according to Emerson, "pure balancing" is what the clear and present danger test has become in the hands of this Court.

Yarbrough joined Emerson in his critical appraisal of the Burger Court's treatment of First Amendment cases by offering evidence that Nixon nominees have: (1) launched a "massive general assault" on overbreadth-vagueness analysis, (2) essentially rewritten obscenity law, (3) curtailed the scope of the public forum concept, (4) exempted military regulations from facial review, and (5) begun efforts to expand exceptions to free expression set forth in the Chaplinsky[19] case.[20]

To the extent that Emerson, Yarbrough, and others are correct in their assessments, it seems to follow that Johnson's assertion about the Burger Court's use of precedent also has relevance to the Court's treatment of freedom of expression cases. How the late Warren Court and the early Burger Court compared in their use of Warren Court precedent in freedom of expression cases is the research question for the present study.

Based on Johnson's findings, we expect that data will show that the two courts differed in the number of Warren Court precedents cited, as well as in the way they treated precedents. Specifically, the Warren Court should not only be more likely to cite its own cases, but cite them more positively than the Burger Court.

The reason for this expectation stems in part from Johnson's comparison of civil liberties cases and economic liberties cases. When type of case was controlled for, it was found that the tendency of the Burger Court to cite precedents less often and less positively did not continue to hold for economic liberties cases. Reasoning that freedom of expression is an issue more closely tied to the realm of civil liberties than economic liberties, we expect results to be similar to Johnson's study when he controlled for type of case. That is, the Burger Court should cite Warren precedents less positively and substantively less often than the Warren Court should cite its own precedent. The total number of Burger Court citations (substantive and non-substantive citations together) will exceed the number of Warren Court citations to itself, concurring again with Johnson's findings.

When Johnson controlled for case outcome, he found that the Burger Court cited positively Warren Court cases that had conservative outcomes, more often than the Burger Court cited positively liberal outcomes. In terms of absolute number of citations made, however, both courts cited the cases with liberal outcomes more often. These findings are expected to be borne out in the present study, when favorability to freedom of expression is controlled for.

Research Design

In addition to restricting the present study to freedom of expression cases,[21] several modifications of method or design were made in an effort to improve on objectivity or validity. These changes in methodology seemed quite in order for the following reasons.

First, Johnson collected citation data on three Warren Court terms from a later Warren Court period and a Burger Court period which were five years and two years in length, respectively. While he corrected for this inequity in part by averaging his data on a per year basis, there remains the fact that the five Warren terms analyzed for citation data (1962-66) actually overlap the precedent terms in question (1961-63), while the later Burger Court does not have this "advantage." In addition, the Burger Court is further potentially "disadvantaged" by the fact that it is separated from the selected Warren Court precedent by a gap of seven to nine years.

We attempted to reduce these problems by equalizing the length of precedent and citation periods--five years each--and by separating precedent and citation periods by equal gaps of time. We determined that freedom of expression cases from the five Warren Court terms from 1958 to 1962 would be Shepardized for citations made during the later 1964-68 Warren Court terms; similarly, cases from the 1964-68 Warren Court terms would be Shepardized for citations made during the 1970-74 Burger Court terms. In each instance, the precedent terms and citation terms are separated by one year--1963 in the first case and 1969 in the second. 1969 was deleted

from consideration since it marked the actual transition from Warren to Burger; for the sake of consistency, 1963 was similarly excluded at the opposite pole of the study.

While we thought it might be desirable to retain only one set of Warren Court terms as the period from which to draw precedents (thus controlling for possible bias introduced should one precedent period contain a greater number of likely-to-be-cited cases than the other), but we deemed consistency of time lapse between precedents and citations more important. We think that courts cite precedent less often as time goes by.[22]

Another problem we perceived in the Johnson design was his rationale for selecting the 1961-63 Warren Court terms as the period from which he drew precedents. Borrowing Schubert's notion that these years comprise a "natural court,"[23] Johnson explained that a greater proportion of liberal decisions were handed down by the Warren Court during this time than during any other natural Court period of the Warren era. Notwithstanding the likelihood that the concept of a natural Court has more bearing on the selection of citing years than on cited years, the fact remains that the greater proportion of liberal decisions occurring during the 1961-63 time slot unfairly stacks the data against the Burger Court. In other words, any differences between the later Warren Court and the early Burger Court in quantity or quality of their citations to these liberal decisions would be magnified (at least hypothetically) by the selection of these cases. A "typical" court period should be used, not a highly liberal "activist" period.

We also questioned Johnson's limiting of the Burger Court period to the first two years. He contended that since only two of Nixon's four appointments to the Court served in 1970-71, any observed change in the Court's treatment of precedent would be even more important. In order for the findings of a study to have any meaningful long-term implications for understanding the Burger Court, however, we should include enough years in the sample to take in all of the Nixon appointees. This not only should stabilize comparisons, but also avoids making the assumption that the Burger Court became more conservative by the addition of two Nixon appointees, which, after all, is the hypothesis for the study.

We used Shepard's classification system in order to categorize citations as positive or negative treatments, following Johnson's example. However, in addition to using the classifications noted earlier, we have also used "explained" as an identification of a positive treatment and "criticized" and "questioned" as negative treatments. We felt that by making full, instead of selective, use of Shepard's codes, accuracy and completeness in measuring Court treatment of earlier decisions are better served. Although the use of "explained" as a positive treatment could be argued, we are at a loss as to why Johnson did not agree about these two additional negative treatments.

Two further departures were made in this study in the interest of making findings exclusive to freedom of expression cases. First, Johnson's comparison of substantive categories of cases were omitted since the present study is limited to type of issue. Second,

Johnson's "Liberal Outcome" and "Conservative Outcome" were replaced by "favorable to freedom of expression" and "unfavorable to freedom of expression," which may or may not coincide. Cases were designated as one or the other by means of the following rule: If the party in the case who claimed that his right to free expression was violated won the case, it was classified as favorable to freedom of expression. If said party lost the case, it was designated as unfavorable to freedom of expression.

Findings

Table 1, Part A, presents the data concerning positive and negative Supreme Court citations to the earlier five-year periods. The results do not parallel those found by Johnson; here, the Warren Court's positive citations of its own precedents are moderate--in fact they are about equal to the level of negative citations. They are higher than the Burger Court's positive citations of Warren Court precedent, but not significantly so (X^2=1.33, d.f.=1, n.s.). Johnson's data dramatically indicated a higher incidence of positive citations by the Warren Court (81.6%) than by the Burger Court (40.7%).

Controlling for outcomes of the original cases, Part B again reveals a decided difference from the Johnson findings. Note that the positive citation of Warren Court decisions that were favorable to freedom of expression seem higher for the Warren Court (50%) than for the Burger Court (39%), but it is an insignificant difference (X^2=.43, d.f.=1, n.s.). In the Johnson study,

precedents with liberal outcomes were cited positively by the Warren Court 84.5% of the time, as contrasted with the Burger Court's 26.3%. His findings were statistically significant.

On the other hand, Part B shows that the Warren and Burger courts gave approximately equal treatment to precedents that were unfavorable to freedom of expression (X^2=0, d.f.=1, n.s.). Both courts positively cited such cases about a third of the time and gave negative treatments two thirds of the time. The Johnson study, while its findings in this application were not significant, showed more positive citations by the Burger Court than by the Warren Court.

These findings suggest a slight tendency for the Burger Court to distinguish or limit the earlier Warren Court decisions in freedom of expression cases. The direction of the data, however, is in no way pronounced.

Part A of Table 2 reports the total number of Warren Court and Burger Court citations to the respective earlier Warren Court terms, as well as the proportion of those citations that were substantive (i.e., followed, harmonized, limited, questioned, etc.). Substantive citations include both positive and negative citations. The figures presented indicate how frequently the Warren Court and Burger Court used Warren Court precedent substantively in their later decisions.

The absolute number of citations over a five-year period was substantively higher for the Burger Court ($z=2.45$, $p.<.05$)

than for the Warren Court,[24] and the proportion of those cases that were substantive was higher also, although slightly so.

While the Johnson study likewise found an increase in total citations for the Burger Court, he found the proportion of substantive citations decreased significantly. The interesting point about Table 2, Part A, is the magnitude of the citations to the Warren Court by the Burger Court. The Burger Court made almost three times as many citations to the Warren Court as the Warren Court made to itself. While it must be noted that the Burger Court cited to a sample of 47 Warren Court cases, as compared with 23 early Warren Court cases to which the later Warren Court cited, the number of Burger Court citations reported here is still well over what would have been expected.

Controlling for the outcome of the original decision in Table 2, Part B, unexpectedly high numbers of total citations for the Burger Court are again shown. Johnson, too, found that for original decisions which were liberal in outcome, the total number of citations by the Burger Court went up; but the proportion of those citations which were substantive went down. By contrast, the present study shows a disproportionately larger difference in the Burger Court's total citations as well as an almost three-fold difference in substantive citations. The number of total Burger Court citations to decisions that were favorable to freedom of expression is also shown in Part B of Table 2. These data indicate that the Burger Court cited the earlier Warren Court precedents about as often as the Warren Court cited itself ($z=.32$, n.s.).

As for the greater percentage of substantive citations reported for the Burger Court, although not significant, it is interesting that the direction of these data is consistent with data by Johnson. In his study, percentages of substantive citations were also lower for the Burger Court under all conditions except "Conservative Outcome."

Table 3 reports a breakdown of cases and citations by year. The Warren Court averaged 10.6 citations to itself per case over the five years observed; the Burger Court, by comparison, averaged 15.3 citations per case to the Warren Court during five years. The same general tendency is shown when only substantive citations are figured per case--the Burger Court consistently averaged more substantive citations to the Warren Court per case than the Warren Court did to its own precedents. This finding was not predicted by the Johnson study.

Discussion

We expected that the Burger Court would not make use of Warren Court precedent, quantitatively or qualitatively, as much as the Warren Court used its own precedent in freedom of expression cases because this is what Johnson's study of use of precedent found generally. We were, however, disappointed in each of the five major hypotheses.

First, we found no difference between the two courts in the ways they cited the Warren Court in freedom of expression cases while the Johnson study found that the Warren Court tended to cite

itself more positively than the Burger Court cited the Warren Court.

Second, we found no difference between the ways the two courts cited the Warren Court when we controlled for favorableness of freedom of expression case outcomes while Johnson's study found that the Warren Court cited itself more positively than the Burger Court cited the Warren Court when the cited case outcomes were liberal, but the Burger Court cited the Warren Court more positively than the Warren Court cited itself when the cited case outcomes were conservative.

Third, we found that the Burger Court cited the Warren Court in raw numbers in free expression cases almost three times as much as the Warren Court cited itself. Johnson, on the other hand, found that the Burger Court cited the Warren Court about as often as the Warren Court cited itself in all cases.

Fourth, we found that in substantive citations to freedom of expression cases, the Burger Court cited the Warren Court about twice as often as the Warren Court cited itself. Johnson's study, however, found that in all substantive citations, the Warren Court cited itself more often than the Burger Court cited the Warren Court.

Finally, we found that the Burger Court cited the Warren Court about three and a half times more often than the Warren Court cited itself when the outcomes were favorable to freedom of expression and about the same as the Warren Court when the outcome was unfavorable. In contrast, the Johnson study found that the Warren

Court substantively cited itself more favorably and about twice as often as the Burger Court cited the Warren Court when the outcome was liberal and the Burger Court cited the Warren Court almost three times as often as the Warren Court cited itself when the outcomes was conservative.

We can, of course, only speculate about the causes for these differences. The most tempting explanation would be the differences in the substance of the respective case samples. Johnson studied economic and civil liberties cases and we studied only freedom of expression cases. Given the level of criticism of the Burger Court for its decisions in the area of freedom of expression, however, we must admit our surprise that the Burger Court has found Warren Court precedent so agreeable. Is the criticism unjustified? We think a mixed answer is in order.

Another possible rationale for the differences in findings would be methodological. We confess that some cell sizes in some of our contingency tables are inadequate to the task of testing for significance. Usually, inadequate cell size works in favor of finding significance where it may not exist, but in our case we could find no significance. The lack of self-citation by the Warren Court, however, is suggestive of significance that was entirely justified by the data. The Warren Court simply did not use its own precedent very often in subsequent First Amendment adjudication. Burger Court justices clearly out-cited their predecessors, even though the precedent belonged to their predecessors.

An alternative methodological explanation would force finding

some fault in Johnson's approach. That fault is discussed in our methodology section. Johnson chose to deal with unequal data bases that clearly biased toward finding significance in differences between the Warren and Burger courts. We do not suggest that no such significance might exist; we do argue, by way of our own findings, that the question is still an open one although, at least in the First Amendment area, we would argue that no differences exist; at best, the Burger Court favors Warren Court precedent more than the Warren Court favored its own precedent.

Yet another conceptual problem could account for differences between findings of the two studies. Favorableness of freedom of expression outcomes, we have assumed, are parallel to liberal outcomes in other kinds of cases. We have no expedient means by which we can document liberal-favorable coding differences, but given Schubert's operationalizations,[25] we think no enough conflict exists to warrant damages to the findings.

Regardless of these differences, we have found an undeniable and curious fact, discussed above, in the magnitude of Burger Court citations to the Warren Court in contrast to the Warren Court citations to itself, <u>substantively as well as generally</u>. The Warren Court appears scarcely to have cited itself.

Perhaps the nature of the respective courts helps explain this phenomenon. Students of the Warren Court credit it for blazing new trails in the area of individual freedoms and for taking initiative in deciding issues that had never been dealt with by the Supreme Court. Perhaps the Warren Court, in its desire to champion these

causes, let precedent be damned and took a diversity of new cases for which no precedent existed, either by previous courts or, in later years, by itself. In short, since many of these activist Warren Court cases were the first of their kind, no precedent was available to cite or if precedent was available, the Warren Court ignored it.

Once these exemplary cases had been set forth by the Warren Court, more citations to them would be expected as subsequent cases on related issues followed. We think it is at least possible that data like those in Table 2 might have been collected on <u>any</u> court immediately following in the wake of the Warren Court legacy and that the findings say nothing in particular about the Burger Court <u>per se</u>. Furthermore, the Burger Court is not only well-known for its political conservatism, but also its institutional conservatism, a significant feature of which is judicial restraint. The iconoclastic Warren Court may have disregarded precedent, but the hoary Burger Court had to mop up afterwards, probably to its own dislike.

We tentatively conclude this, however: The Burger Court cited the Warren Court's freedom of expression cases abundantly; the new Court has <u>not</u> ignored Warren Court precedent in First Amendment areas.

ENDNOTES

[1]See generally, R. Saylor, B. Boyer & R. Gooding, THE WARREN COURT (1969); A. Cox, THE WARREN COURT (1968); A. Bickel, POLITICS AND THE WARREN COURT (1965); P. Kurland, POLITICS, THE CONSTITUTION, AND THE WARREN COURT (1970); C. Lytle, THE WARREN COURT AND ITS CRITICS (1968).

[2]See generally, L. Kohlmeier, "GOD SAVE THIS HONORABLE COURT!" (1972); J. Simon, IN HIS OWN IMAGE (1973); R. Harris, DECISION (1971).

[3]R. Funston, CONSTITUTIONAL COUNTERREVOLUTION? (1977).

[4]Id. at 339.

[5]S. Wasby, CONTINUITY AND CHANGE (1976).

[6]Neuborne, The Procedural Assault on Warren Legacy: A Study in Repeal by Indirection, 5 HOFSTRA L. Q. 580 (1977).

[7]Id.

[8]Slotnick, Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger, 23 AM. J. OF POL. SCI. 78 (1979).

[9]Johnson, Policy Change in the U.S. Supreme Court, 62 SOC. SCI. Q. 751 (1981).

[10]G. Schubert, THE JUDICIAL MIND REVISITED (1974).

[11]Johnson's tables are in Appendix 1.

[12]Emerson, First Amendment Doctrine and the Burger Court, 68 CALIF. L. REV. 422 (1980).

[13]Id. at 440.

[14]438 U.S. 1 (1978).

[15]443 U.S. 368 (1979).

[16]429 U.S. 274 (1977).

[17]Id. at 440.

[18]Id.

[19]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[20]Yarbrough, The Burger Court and Freedom of Expression, 33 WASH. & LEE L. REV. 89 (1976).

[21]Freedom of expression cases were operationally defined as cases listed in the indexes of volumes of U.S. Reports under the headings "Freedom of Speech," "Freedom of the Press," or "Freedom of Assembly." The Warren Court was observed citing to 23 cases, and the Burger Court was observed citing to 47 cases.

[22]Cf. Johnson, supra at 756

[23]"Natural Court" is a term coined by Glendon Schubert and refers to a time period during which no personnel changes occurred.

[24]We, like Johnson, are using a z difference of proportions test. See H. Blalock, SOCIAL STATISTICS 228-230 (1972).

[25]Schubert, supra.

TABLE 1

Positive and Negative Citations of 1961–63 Supreme Court Decisions by the Warren Court (1962–66) and Burger Court (1970–71)

A. Citation to All 1961–63 Supreme Court Decisions

	Warren Court	Burger Court
Positive citations	81.6%	40.7%
Negative citations	18.4%	59.3%
N =	222	59
	$x^2 = 40.6$, $p < .001$	
	$\phi = .38$	

B. Citation to 1961–63 Supreme Court Decisions by Type of Issue in Original Decision[a]

	Civil Liberties (*n* = 144)		*Economic Liberties* (*n* = 140)	
	Warren Court	Burger Court	Warren Court	Burger Court
Positive citations	87.6%	25.0%	52.8%	54.5%
Negative citations	12.4%	75.0%	47.2%	45.5%
N =	170	32	36	22
	$x^2 = 61.0$, $p < .001$		$x^2 = .02$ n.s.	
	$\phi = .55$		$\phi = .00$	

C. Citation to 1961–63 Supreme Court Decisions by Outcome of Original Decision[b]

	Liberal Outcome (*n* = 266)		*Conservative Outcome* (*n* = 73)	
	Warren Court	Burger Court	Warren Court	Burger Court
Positive citations	84.5%	26.3%	47.1%	65.0%
Negative citations	15.5%	73.7%	52.9%	35.0%
N =	200	38	17	20
	$x^2 = 56$, $p < .001$		$x^2 = 1.2$ n.s.	
	$\phi = .49$		$\phi = .18$	

[a]Excludes 63 noncivil liberties and noneconomic liberties cases as coded by Schubert.

[b]Excludes eight nonscale cases as coded by Schubert.

TABLE 2

Average Annual Citations[a] of 1961–63 Supreme Court Decisions in Majority and Concurring Opinions by the Warren Court (1963–66) and Burger Court (1970–71)

A. Citation to All 1961–63 Supreme Court Decisions

	Warren Court	Burger Court
Total citations	265.6	287.5
% substantive citations	16.3%	10.1%
Significance[c]	$z = 2.13$, $p < .04$	

B. Citation of 1961–63 Supreme Court Decisions by Type of Issue in Original Decision[b]

	Civil Liberties (*n* = 144)		*Economic Liberties* (*n* = 140)	
	Warren Court	Burger Court	Warren Court	Burger Court
Total citations	190	221	63.4	49.0
% substantive citations	17.9%	7.2%	11.4%	22.4%
Significance[c]	$z = 3.2$, $p < .001$		$z = 1.55$ ns	

C. Citation of 1961–63 Supreme Court Decisions by Outcome of Original Decision[b]

	Liberal Outcome (*n* = 266)		*Conservative Outcome* (*n* = 73)	
	Warren Court	Burger Court	Warren Court	Burger Court
Total citations	233.4	251.0	32.2	36.0
% substantive citations	17.2%	7.6%	10.6%	28.6%
Significance[c]	$z = 3.22$, $p < .001$		$z = 1.84$, $p < .07$	

[c]Significance calculated using a difference of proportions test. See H. Blalock, *Social Statistics* (New York: McGraw-Hill, 1972):228–30.

[a]Since a different number of terms is included for each court, average annual citation rates are computed for comparisons between the Warren and Burger Courts: the Warren citations were divided by five and the total number of Burger citations were divided by two for the five and two terms analyzed for the respective courts.

[b]Excludes 63 noncivil liberties and noneconomic liberties cases as coded by Schubert.

[c]Excludes eight nonscale cases as coded by Schubert.

APPENDIX 2
LIST OF CASES

Cases cited by the Warren Court:

Kingsley Pictures Corp. v. Regents of New York University, 360 U.S. 684 (1958)
Barenblatt v. United States, 360 U.S. 109 (1959)
Smith v. California, 361 U.S. 147 (1959)
Bates v. Little Rock, 361 U.S. 516 (1959)
Talley v. California, 362 U.S. 60 (1959)
Shelton v. Tucker, 364 U.S. 479 (1960)
Times Film Corp. v. Chicago, 365 U.S. 43 (1960)
Wilkerson v. United States, 365 U.S. 399 (1960)
Braden v. United States, 365 U.S. 431 (1960)
Konigsberg v. State Bar, 366 U.S. 36 (1960)
In re Anastaplo, 366 U.S. 582 (1960)
Lousiana v. N.A.A.C.P., 366 U.S. 293 (1960)
Communist Party v. Control Board, 361 U.S. 1 (1960)
Scales v. United States, 367 U.S. 203 (1960)
Marcus v. Search Warrant, 367 U.S. 717 (1960)
Manual Enterprises v. Day, 370 U.S. 478 (1961)
Wood v. Georgia, 370 U.S. 375 (1961)
N.A.A.C.P. v. Button, 371 U.S. 415 (1962)
Meat Drivers v. United States, 371 U.S. 94 (1962)
Gibson v. Florida Legislative Committee, 372 U.S. 539 (1962)
Bantam Books v. Sullivan, 372 U.S. 58 (1962)
Edwards v. South Carolina, 372 U.S. 229 (1962)
Railway Clerks v. Allen, 373 U.S. 113 (1962)

Cases cited by the Burger Court:

Garrison v. Louisiana, 379 U.S. 64 (1964)
Cox v. Louisiana, 379 U.S. 536 (1964)
Freedman v. Maryland, 380 U.S. 51 (1964)
Dombrowski v. Pfister, 380 U.S. 479 (1964)
Henry v. Collins, 380 U.S. 356 (1964)
Estes v. Texas, 381 U.S. 532 (1964)
Memoirs v. Massachusetts, 383 U.S. 413 (1965)
Mishkin v. New York, 383 U.S. 502 (1965)
Ginzburg v. United States, 383 U.S. 463 (1965)
DeGregory v. New Hampshire Attorney General, 383 U.S. 825 (1965)
Rosenblatt v. Baer, 383 U.S. 75 (1965)
Linn v. Plant Guard Workers, 383 U.S. 53 (1965)
Elfbrandt v. Russell, 384 U.S. 11 (1965)
Mills v. Alabama, 384 U.S. 214 (1965)
Sheppard v. Maxwell, 384 U.S. 333 (1965)
Keyishian v. Board of Regents, 385 U.S. 589 (1966)
Bond v. Floyd, 385 U.S. 116 (1966)
Time, Inc. v. Hill, 385 U.S. 374 (1966)
Adderly v. Florida, 385 U.S. 39 (1966)
Redrup v. New York, 386 U.S. 767 (1966)
Walker v. City of Birmingham, 388 U.S. 307 (1966)

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966)
United States v. Robel, 389 U.S. 258 (1967)
Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967)
Beckley Newspaper Co. v. Hanks, 389 U.S. 81 (1967)
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1967)
St. Amant v. Thompson, 390 U.S. 727 (1967)
Cameron v. Johnson, 390 U.S. 611 (1967)
Feitel Film Corp. v. Cusack, 390 U.S. 139 (1967)
Ginzberg v. New York, 390 U.S. 629 (1967)
Schnider v. Smith, 390 U.S. 17 (1967)
United States v. O'Brien, 391 U.S. 367 (1967)
Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1967)
Pickering v. Board of Education, 391 U.S. 563 (1967)
Rabeck v. New York, 391 U.S. 462 (1967)
Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1967)
Carroll v. Princess Anne, 393 U.S. 175 (1968)
Tinker v. Des Moines School District, 393 U.S. 503 (1968)
Gregory v. Chicago, 394 U.S. 111 (1968)
Stanley v. Georgia, 394 U.S. 557 (1968)
Shuttlesworth v. Birmingham, 394 U.S. 147 (1968)
Street v. New York, 394 U.S. 576 (1968)
Golden v. Zwickler, 394 U.S. 103 (1968)
Citizen Publishing Co. v. United States, 394 U.S. 131 (1968)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968)
Brandenburg v. Ohio, 395 U.S. 444 (1968)
NLRB v. Gissel Packing Co., 395 U.S. 575 (1968)

TABLE 1

PART A

Positive and Negative Citations to 1958-62 Warren Court Decisions by 1964-68 Warren Court

and

Positive and Negative Citations to 1964-68 Warren Court Decisions by 1970-74 Burger Court

	Citations to 1958-62 Freedom of Expression Supreme Court Decisions by the Warren Court, 1964-68	Citations to 1965-68 Freedom of Expression Supreme Court Decisions by the Burger Court, 1970-74
Positive Citations	44%	36.8%
Negative Citations	56%	63.2%
Total Substantive Citations	9	57

X^2=1.33, d.f.=1, n.s. ϕ=.14, n.s.

PART B

Citations by Outcome of Original Decision

Favorable to Freedom of Expression

Positive Citations	50%	39%
Negative Citations	50%	61%
Total Substantive Citations	6	41

X^2=.43, d.f.=1, n.s. ϕ=.14, n.s.

Unfavorable to Freedom of Expression

Positive Citations	33.3%	31.2%
Negative Citations	66.7%	68.8%
Total Substantive Citations	3	16

X^2=0, d.f.=1, n.s.

TABLE 2

PART A

Percent of Total Citations Given Substantive Treatment

	Citations to 1958-62 Warren Court Decisions by the 1964-68 Warren Court	Citations to 1964-68 Warren Court Decisions by 1970-74 Burger Court
Total Citations	153	429
% Substantive Citations	5.9%	13%

$z=2.45$, $p. < .05$

PART B

Percent of Substantive Citations by Outcome of Original Decision

	Warren Court Citations to Warren Court	Burger Court Citations to Warren Court
Favorable to Freedom of Expression		
Total Citations	122	284
% Substantive Citations	4.1%	14.4%

$z=3.33$, $p. < .05$

Unfavorable to Freedom of Expression		
Total Citations	31	149
% Substantive Citations	12.9%	10.7%

$z=.32$, n.s.

TABLE 3

PART A

1964-68 Warren Court Citations to 1958-62 Warren Court by Term

	1958	1959	1960	1961	1962	Totals
No. of Free Expression Cases	2	3	10	2	6	23
Total Citations	13	31	50	10	57	161
No. of Substantive Citations	1	0	4	0	4	9
Average Total Citations/Case	6.5	10.3	5	5	9.5	7
Average Substan. Citations/Case	.5	0	.4	0	2.5	.39

PART B

1970-74 Burger Court Citations to 1964-68 Warren Court by Term

	1964	1965	1966	1967	1968	Totals
No. of Free Expression Cases	6	9	7	14	11	47
Total Citations	83	66	60	91	81	381
No. of Substantive Citations	12	6	9	12	17	56
Average Total Citations/Case	13.8	7.3	8.6	6.5	7.4	8.1
Average Substan. Citations/Case	2	.67	1.28	.86	1.55	1.2